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# Legislating Environmental Regulation

***Norb Plassmeyer, Associated Industries of Missouri***

Consistency, predictability, independence, transparency, and efficiency form the basis for the preferred way many in businesses facing environmental regulation hope the regulators will go about their business. It is not yet that way and, therefore, legislation is proposed to move things in that direction. This year's new legislators have shown themselves capable of introducing bills arising from experience of their own constituency and depending less on organized groups to recommend action. Senate Bill 36, introduced by Senators Klindt and Cauthorn, which would require risk assessment and cost benefit analysis for environmental rules is one example. In the Missouri House, Rep. Portwood has introduced House Bill 203 which calls for a statement of legislative intent which would govern administrative rules, and Rep. Myers has introduced House Bill 241 which calls for notification of permit holders before issuing notice of violation for failure to file reports.

Some old friends from the past will also be considered in 2003. Senator Sarah Steelman's Senate Bill 25 brings back last year's proposal to have appeals of environmental issues go to the administrative hearing commission. Another proposal about to be introduced would place most environmental issues under a single Natural Resources and Environment Commission, following the example currently in place in Illinois.

Several bills extending the time of collection of a fifty-cent fee on tire sales have been introduced in the House and Senate. The fees go into a fund that supports cleanup of waste tires. Also, an extension of time for collection of hazardous waste fees may be offered for consideration.

Two perennials from times past may receive serious consideration this year. They are the "environmental regulation consistency act" which addresses the "stricter than federal" issue in a positive way; and bills yet to be introduced establishing a limited privilege for environmental audits.

Out of the discussion of these important issues there is hope for doing something that will contribute to an improved business climate for Missouri.

## What's Inside...



# MDNR Initiates Review of CALM Document

***Roger Walker, Armstrong Teasdale LLP***

In move designed to improve CALM flexibility, cost effectiveness, and administrative ease, Jim Werner, Director, Division of Air and Land, has directed Betty Wyse, Acting Director, Hazardous Waste Program "to lead a review and revision of the CALM process."

According to Werner, the review of CALM is one of the most important initiatives "for ensuring that environmental protection is accomplished in a way that encourages economic and community development." He adds that "the current situation is not acceptable in which thousands of sites remain undeveloped in locations with established infrastructures."

The initial facilitated meeting held on December 11 in Jefferson City served as listening post for MDNR to hear suggestions for improving the program as well as those areas that are working well from stakeholders who have worked with CALM.

As part of the discussion, a number of program impediments were raised including:

1. Program flexibility;
2. Contractual penalty provision;
3. Failure to address groundwater; and
4. Easement provisions.

In addition, the work group discussed at length the idea of "Long Term

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Stewardship" and the use of "Activity and Use Limitations" to ensure that any residual contamination does not create new problems for future land owners or the adjacent community.

Jim Werner began this discussion with a presentation that focused on a handful of sites across the country where the use of traditional institutional controls had failed and a carefully phrased concern that MDNR does not want to foster the creation of a "Superfund II" in which we are forced to cleanup sites where residual contamination has been left in place without proper safeguards.

Werner noted in a separate memo circulated at the meeting that one option that is **not** on the table is "allowing residual contamination to remain in place and issuing a no further action letter without any institutional controls or Long Term Stewardship."

Werner also noted that the on-going work of the risk-based groundwater rulemaking group will serve as a valuable tool that will be dovetailed into the review of CALM. Others noted that the term "risk-based groundwater rule" is a misnomer since the concept and language under discussion goes well beyond the issue of groundwater.

The internal memo from Jim Werner noted above was circulated to the work group. In this memo, Werner outlined his goals for the review of CALM. In short, he urged those staff involved in this review to:

1. Solicit and use input from the public and other stakeholders in an open process.
2. Use the best scientific and technical information already available without "reinventing the wheel" (e.g, see National Academy of Sciences studies on the issue and the Draft Uniform Environmental Covenant).
3. Seek to use the least cost options and minimum controls that provide effective long-term protection of human health and the environment, as well as public confidence in land use controls of residually contaminated properties.
4. Consider rigorous life cycle cost analyses to evaluate the relative costs of reliable long-term stewardship versus the marginal costs of additional cleanup.
5. Examine the availability, value and cost-effectiveness of new technologies for providing LTS (e.g., GPS data and GIS); while selecting the most cost-effective technical options.
6. Use applicable "performance objectives" and other relevant material from the IC subgroup of the ground water rule workgroup (e.g., durable, enforceable, flexible, trackable).
7. Work cooperatively with other DNR Divisions and programs (APCP, GSRAD, OAC and WPSCD) and departments as appropriate.
8. What are the alternatives and effectiveness of various incentives to ensure that the frequency, duration and impact of exposure is minimized, and, if possible eliminated?
9. Consider the context of any "institutional controls" or long term stewardship mechanisms (e.g., relationships and role and responsibilities of private or institutional owners and developers and the roles and possibilities of local governments).
10. Establish a "reopener" process, whereby (a) the whole CALM document is reviewed every five years to determine if it has met our goals and whether additional changes and performance goals are appropriate and (b) specific elements are reviewed as appropriate (e.g., to address new toxicology information).
11. Evaluate pros and cons of publishing CALM as a rule not as a guide.
12. Seek consistency among various DNR programs (e.g., Federal Facilities Section work on the Weldon Spring Site).

Finally, according to Werner, the success of this review process will be judged by the ability of those who administer CALM to:

1. Increase the predictability and user-friendliness of the process.
2. Increase the number of brownfields development sites by at least double the current annual rate, and hopefully by an order of magnitude.
3. Reduce exposures of hazardous substances and financial "surprises" to developers, contractors, insurance companies and laborers who might be exposed to hazardous substances while working in excavation or well drilling operations.
4. Developers and residents believe they have a realistic options of building, living and working in existing developed areas where residual contamination may exist, instead of feeling like they need to move to greenfield sites to avoid residual contamination that are not developed because of environmental (real and perceived) and financial barriers.
5. Participants in the VCP and CALM process encourage other people to enter the program.
6. Properties that have been developed using the CALM process have a greater value in subsequent transactions than comparable properties with residual contamination (e.g. "self help") that have not been developed using the process because of greater confidence that the VCP property will not contain any surprises.
7. Establish environmental land use controls as a routine, predictable element of property transactions by land governments, developers and real estate agents, rather than exotic and uncertain instruments.

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